

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

OFFICE OF COMPLIANCE & INSPECTION

**IN RE: David A. Whitney
Annette L. Whitney**

**FILE NO.: CI 11-075
X-ref.: WP 94-236**

NOTICE OF VIOLATION

A. Introduction

Pursuant to Sections 42-17.1-2(21) and 42-17.6-3 of the Rhode Island General Laws, as amended, (“R.I. Gen. Laws”) you are hereby notified that the Director of the Department of Environmental Management (the “Director” of “DEM”) has reasonable grounds to believe that the above-named parties (“Respondents”) have violated certain statutes and/or administrative regulations under DEM's jurisdiction.

B. Administrative History

The DEM issued an informal written notice to the Respondents on June 7, 2011 for the violations. The notice required that specific actions be taken to correct the violations. The Respondents failed to comply with the notice.

C. Facts

- (1) The subject property is located at 2 Andrews Terrace, Assessor's Plat 5, Lot 216 in the town of North Smithfield, Rhode Island (the “Property”). The Property includes a six-bedroom two-unit residential dwelling (the “Dwelling”).
- (2) The Respondents own the Property.
- (3) DEM inspected the Property on May 26, 2011. The inspection revealed that sewage was discharged to the surface of the ground and into the waters of the State from the on-site wastewater treatment system (“OWTS”) at the Dwelling as evidenced by:
 - (a) Observation of a pipe on the bank of the Branch River on the opposite side of Andrews Terrace from the Dwelling;
 - (b) Observation of black soil and solids associated with sewage at the pipe outlet;
 - (c) Detection of odors associated with sewage at the pipe outlet;
 - (d) Observation of water discharging into the Branch River from the pipe outlet;
 - (e) Observation of red dye that was placed in the toilet bowl in the Dwelling discharging from the pipe outlet; and
 - (f) Photographs showing black soil, toilet paper, feces and red dye at the pipe outlet and water from the pipe discharging into the Branch River.

- (4) The Respondents did not receive approval from DEM to discharge sewage from the Dwelling to the Branch River.
- (5) As of the date of this Notice of Violation (“NOV”), the Respondents have failed to comply with the DEM’s Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems (the “OWTS Regulations”) and the DEM’s Water Quality Regulations.

D. Violation

Based on the foregoing facts, the Director has reasonable grounds to believe that you have violated the following statutes and/or regulations:

- (1) **R.I. Gen. Laws Section 46-12-5(a)** – prohibiting the placement of any pollutant in a location where it is likely to enter the waters of the State.
- (2) **DEM’s Water Quality Regulations, Rule 13(A)** – prohibiting the discharge of any pollutant into or conducting any activity which will likely cause or contribute pollution to the waters of the State without having obtained all required approvals from the DEM.
- (3) **DEM’s OWTS Regulations**
 - (a) **Rule 8.7** - prohibiting the discharge of wastewater to a watercourse.
 - (b) **Rule 8.8** – prohibiting the discharge of wastewater to the surface of the ground.
 - (c) **Rule 17.7** – requiring submittal of a repair application for a failed OWTS.

E. Order

Based upon the violations alleged above and pursuant to R.I. Gen. Laws Section 42-17.1-2(21), you are hereby ORDERED to:

- (1) **IMMEDIATELY** take steps to reduce the discharge of sewage from the Dwelling, such as through the installation and use of water conservation devices and fixtures.
- (2) **Within ninety (90) days of receipt of this NOV**, submit a formal application and plan to the DEM to repair the OWTS that is prepared by a licensed OWTS designer in accordance with the OWTS Regulations (the “Application”). **Any repairs or modifications to the OWTS require the prior approval of the DEM.** The list of licensed OWTS designers can be obtained by contacting Deb Knauss at 222-4700, extension 7612 or from the DEM web page at: www.dem.ri.gov/programs/benviron/water/licenses/OWTS/pdfs/deslist.pdf.
- (3) The Application shall be subject to the DEM’s review and approval. Upon review, the DEM shall provide written notification to you either granting formal approval or stating the deficiencies therein. Within fourteen (14) days (unless a longer time is specified) of receiving a notification of deficiencies in the

Application, you must submit to the DEM a modified proposal or additional information necessary to correct the deficiencies.

- (4) Commence work on the project in accordance with the method approved by the Director within twenty (20) days of approval (unless otherwise expressly authorized by the DEM in writing to commence work at a later time), and complete such work within one hundred twenty (120) days of said approval or other date specified by the DEM.

F. Penalty

- (1) Pursuant to R.I. Gen. Laws Section 42-17.6-2, the following administrative penalty, as more specifically described in the attached penalty summary and worksheets, is hereby ASSESSED, jointly and severally, against each named respondent:

Three Thousand Seven Hundred Dollars (\$3,700.00)

- (2) The proposed administrative penalty is calculated pursuant to the DEM's Rules and Regulations for Assessment of Administrative Penalties, as amended, and must be paid within twenty (20) days of your receipt of this NOV. Payment shall be in the form of a certified check, cashiers check or money order made payable to the "General Treasury - Water & Air Protection Program Account," and shall be forwarded to the DEM's Office of Compliance and Inspection, 235 Promenade Street, Suite 220, Providence, Rhode Island 02908-5767.
- (3) Penalties assessed against the Respondents in this NOV are penalties payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.
- (4) If any violation alleged herein shall continue, then each day during which the violation occurs or continues shall constitute a separate offense and the penalties and/or costs for that violation shall continue to accrue in the manner set forth in the attached penalty summary and worksheets. The accrual of additional penalties and costs shall be suspended if the Director determines that reasonable efforts have been made to comply promptly with this NOV.

G. Right to Administrative Hearing

- (1) Pursuant to R.I. Gen. Laws Chapters 42-17.1, 42-17.6, 42-17.7 and 42-35, each named respondent is entitled to request a hearing before the DEM Administrative Adjudication Division regarding the allegations, orders and/or penalties set forth in Sections B through F above. All requests for hearing MUST:
 - (a) Be in writing. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.6-4(b);
 - (b) Be **RECEIVED** by DEM's Administrative Adjudication Division, at the following address, within twenty (20) days of your receipt of this NOV. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.7-9;

Administrative Clerk
DEM - Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02903

- (c) Indicate whether you deny the alleged violations and/or whether you believe that the administrative penalty is excessive. See R.I. Gen. Laws Section 42-17.6-4(b); **AND**
 - (d) State clearly and concisely the specific issues which are in dispute, the facts in support thereof and the relief sought or involved, if any. See Rule 7.00(b) of the DEM Administrative Rules of Practice and Procedure for the Administrative Adjudication Division of Environmental Matters.
- (2) A copy of each request for hearing must also be forwarded to:
- Richard M. Bianculli, Jr., Esquire
DEM - Office of Legal Services
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767
- (3) Each named respondent has the right to be represented by legal counsel at all administrative proceedings relating to this matter.
 - (4) Each respondent must file a separate and timely request for an administrative hearing before DEM's Administrative Adjudication Division as to each violation alleged in the written NOV. If any respondent fails to request a hearing in the above-described time or manner with regard to any violation set forth herein, then this NOV shall automatically become a Final Compliance Order enforceable in Superior Court as to that respondent and/or violation and any associated administrative penalty proposed in the NOV shall be final as to that respondent. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and (v) and 42-17.6-4(b) and (c).
 - (5) Failure to comply with this NOV may subject each respondent to additional civil and/or criminal penalties.
 - (6) An original signed copy of this NOV is being forwarded to the town of North Smithfield wherein the Property is located to be recorded in the Office of Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and 42-17.1-2(13), as amended.
 - (7) This NOV does not preclude the Director from taking any additional enforcement action nor does it preclude any other local, state, or federal governmental entities from initiating enforcement actions based on the acts or omissions described herein.

If you have any legal questions, you may contact (or if you are represented by an attorney, please have your attorney contact) Richard M. Bianculli, Jr. at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Patrick

Hogan of the DEM Office of Compliance and Inspection at (401) 222-1360 extension 7119.

Please be advised that any such inquiries do not postpone, eliminate, or otherwise extend the need for a timely submittal of a written request for a hearing, as described in Section G above.

FOR THE DIRECTOR

David E. Chopy, Chief
DEM Office of Compliance and Inspection

Date: _____

CERTIFICATION

I hereby certify that on the _____ day of _____
the within Notice of Violation was forwarded to:

David A. Whitney
2 Andrews Terrace
North Smithfield, RI 02896-6802

Annette L. Whitney
2 Andrews Terrace
North Smithfield, RI 02896-6802

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, OWTS & Water Pollution
 File No.: CI 11-075 & WP 94-236
 Respondents: David A. Whitney & Annette L. Whitney

GRAVITY OF VIOLATION					
<small>SEE ATTACHED "PENALTY MATRIX WORKSHEETS."</small>					
VIOLATION No. & CITATION	APPLICATION OF MATRIX		PENALTY CALCULATION		AMOUNT
	Type	Deviation	Penalty from Matrix	Number or Duration of Violations	
D(3)(b) – Discharge of sewage to the surface of the ground	Type I (\$1,000 Max. Penalty)*	Major	\$800	1 violation	\$800
D(3)(c) – Failure to submit an OWTS repair application	Type I (\$1,000 Max. Penalty)*	Minor	\$400	1 violation	\$400
D(1), D(2) & D(3)(a) – Discharge of sewage into the Branch River	Type I (\$25,000 Max. Penalty)*	Minor	\$2,500	1 violation	\$2,500
SUB-TOTAL					\$3,700

*Maximum Penalties represent the maximum penalty amounts per day, per violation.

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$3,700.00

PENALTY MATRIX WORKSHEET

CITATION: Discharge of sewage to the surface of the ground

VIOLATION NO.: D(3)(b)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare or environment.	____ TYPE II INDIRECTLY related to protecting health, safety, welfare or environment.	____ TYPE III INCIDENTAL to protecting health, safety, welfare or environment.
DEVIATION FROM THE STANDARD THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p>FACTORS CONSIDERED:</p> <p>Taken from Section 10 (a) (2) of the DEM <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) The extent to which the act or failure to act was out of compliance: Sewage was discharged to the ground surface from an OWTS. Preventing the discharge of sewage to the surface of the ground is a primary objective of the regulations and a major objective of the regulatory program.</p> <p>(B) Environmental conditions: The dwelling is a six-bedroom two unit apartment building in a moderately populated neighborhood.</p> <p>(C) Amount of the pollutant: The volume of the sewage discharged is unknown.</p> <p>(D) Toxicity or nature of the pollutant: Sewage contains many kinds of bacteria, viruses, and parasites that can cause serious or fatal diseases in both humans and animals, as well as being the source of extremely objectionable odors.</p> <p>(E) Duration of the violation: Unknown. DEM first observed the violation on May 26, 2011.</p> <p>(F) Areal extent of the violation: Unknown.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: The Respondents failed to repair the OWTS despite receiving notice from DEM on June 9, 2011 requiring that they do so.</p> <p>(H) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce: Not utilized for this calculation.</p> <p>(I) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable: The Respondents have control over the violation. The Respondents are aware of the necessary actions to correct the violation.</p> <p>(J) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on June 7, 2011 stated that non-compliance would result in the issuance of a formal enforcement action that would include administrative penalties.</p>		
<u> X </u> MAJOR	MODERATE	MINOR

Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$800 to \$1,000 \$800	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	MINOR	\$400 to \$600	\$200 to \$400	\$100 to \$200

PENALTY MATRIX WORKSHEET

CITATION: Failure to submit an OWTS repair application

VIOLATION NO.: D(3)(c)

TYPE		
<p style="text-align: center;"><u> X </u> TYPE I</p> <p><u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">_____ TYPE II</p> <p><u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">_____ TYPE III</p> <p><u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>
DEVIATION FROM THE STANDARD		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p><u>FACTORS CONSIDERED:</u></p> <p>Taken from Section 10 (a) (2) of the DEM <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) The extent to which the act or failure to act was out of compliance: The Respondents failed to submit a repair application for the OWTS. The repair of failed OWTS's is a primary objective of the regulations and of importance to the regulatory program.</p> <p>(B) Environmental conditions: The dwelling is a six-bedroom two unit apartment building in a moderately populated neighborhood.</p> <p>(C) Amount of the pollutant: Not utilized for this calculation.</p> <p>(D) Toxicity or nature of the pollutant: Not utilized for this calculation.</p> <p>(E) Duration of the violation: Unknown. The Respondents received notice from DEM on June 9, 2011 requiring that they submit a repair application.</p> <p>(F) Areal extent of the violation: Not utilized for this calculation.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: The Respondents failed to submit a repair application despite receiving notice from DEM on June 9, 2011 requiring that they do so.</p> <p>(H) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce: Not utilized for this calculation.</p> <p>(I) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable: The Respondents have control over the violation. The Respondents are aware of the necessary actions to correct the violation.</p> <p>(J) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on June 7, 2011 stated that non-compliance would result in the issuance of a formal enforcement action that would include administrative penalties.</p>		
MAJOR	MODERATE	<u> X </u> MINOR

Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000	TYPE I	TYPE II	TYPE III
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DEVIATION FROM STANDARD	MAJOR	\$800 to \$1,000	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	<i>MINOR</i>	\$400 to \$600 \$400	\$200 to \$400	\$100 to \$200

PENALTY MATRIX WORKSHEET

CITATION: Discharge of sewage into the Branch River

VIOLATION NO.: D(1), D(2), & D(3)(a)

TYPE		
<p style="text-align: center;"><u> X </u> TYPE I</p> <p><u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">_____ TYPE II</p> <p><u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">_____ TYPE III</p> <p><u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>
DEVIATION FROM THE STANDARD		
THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p>FACTORS CONSIDERED:</p> <p>Taken from Section 10 (a) (2) of the DEM <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) The extent to which the act or failure to act was out of compliance: Sewage was discharged from the dwelling into the Branch River, a water of the State. Preventing the discharge of sewage to a location where it is likely to enter a water of the State is a primary objective of the regulations.</p> <p>(B) Environmental conditions: Sewage was discharged from a pipe from a six-bedroom two-unit apartment building. Sewage was discharged into the Branch River, a class B water of the State. The designated uses for class B waters are primary and secondary recreational contact activities, fish and wildlife habitat, and good aesthetic value.</p> <p>(C) Amount of the pollutant: The volume of the sewage discharged is unknown.</p> <p>(D) Toxicity or nature of the pollutant: Sewage contains many kinds of bacteria, viruses, and parasites that can cause serious or fatal diseases in both humans and animals, as well as being the source of extremely objectionable odors.</p> <p>(E) Duration of the violation: Unknown. DEM first observed the violation on May 26, 2011.</p> <p>(F) Areal extent of the violation: Not utilized for this calculation.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance: The Respondents failed to repair the OWTS despite receiving notice from DEM on June 9, 2011 that required they do so.</p> <p>(H) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce: Not utilized for this calculation.</p> <p>(I) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable: The Respondents have control over the violation. The Respondents are aware of the necessary actions to correct the violation.</p> <p>(J) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on June 7, 2011 stated that non-compliance would result in the issuance of a formal enforcement action that would include administrative penalties.</p>		
MAJOR	MODERATE	<u> X </u> MINOR

Penalty Matrix where the applicable statute provides for a civil penalty up to \$25,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$12,500 to \$25,000	\$6,250 to \$12,500	\$2,500 to \$6,250
	MODERATE	\$6,250 to \$12,500	\$2,500 to \$6,250	\$1,250 to \$2,500
	MINOR	\$2,500 to \$6,250 \$2,500	\$1,250 to \$2,500	\$250 to \$1,250